No. 91-1406

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IN THE

Supreme Court of the United States

October Term, 1991

AMERICAN TRAIN DISPATCHERS ASSOCIATION,
Petitioner,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals, relying primarily upon its interpretation of *Leedom v. Kyne* (358 U.S. 184), properly affirmed an injunction against ongoing proceedings before the National Railroad Adjustment Board (NRAB), prior to final NRAB action and outside the statutory procedure for review of NRAB orders, on the ground the NRAB lacks jurisdiction over the matter and where the rail carrier sought to avoid the time, effort, and money of the NRAB proceeding.

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Petitioner, American Train Dispatchers Association, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit in this proceeding.

OPINIONS BELOW

The opinion of the court of appeals (App. A, 1a-13a), is reported at *Southern Ry. Co. v. American Train Dispatchers Assn.*, 948 F.2d 887.

The opinion of the district court (App. C, 16a-27a) is not reported.

JURISDICTION

The opinion of the court of appeals (App. A, 1a-13a), along with the judgment, were entered November 1, 1991. The petition for rehearing and suggestion en banc, were denied by the court of appeals (App. B, 14a-15a) on December 2, 1991.

The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1), 2101(c).

STATUTES INVOLVED

The statutes primarily involved are 45 U.S.C. § 152, Ninth, and 45 U.S.C. § 153, First (h), (i) and (q).

UNITED STATES CODE (1988 Ed.)
TITLE 45 — § 152

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names

of their duly designated and authorized representatives in such a manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

§ 153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided —

* * * * *

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

* * * * *

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-

car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

* * * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * * * *

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division, or to set it aside, in whole or in part, or it may remand the proceedings to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the

parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28.

STATEMENT OF THE CASE

1. Statutory Background.

The National Railroad Adjustment Board (NRAB) is a federal agency, located at Chicago, Illinois, established under the Railway Labor Act (RLA), 45 U.S.C. 153, First, which is authorized to resolve disputes between employees and rail carriers growing out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions. (App. C, 19a). 45 U.S.C. 153, First (i):

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but failing to reach an adjustment in this manner, the dispute may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the dispute.

The NRAB is divided into four divisions, of which the third division has jurisdiction over disputes involving train dispatchers. 45 U.S.C. 153, First (h). The division issues its awards in writing, by majority vote, which may include provisions for the payment of money. 45 U.S.C. 153, First (m), (n), (o).

If an employee or a carrier is aggrieved by an award, a petition for review may be filed in the district court. The findings and order of the division shall be conclusive, except that the order may be set aside on several named grounds, one of which is lack of jurisdiction. 45 U.S.C. 153, First (q):

> . . . On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside. . . for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or . . .

The Supreme Court in a series of cases has ruled that the primary jurisdiction of the NRAB should not be frustrated by premature judicial action. Challenges to the NRAB's jurisdiction can be made after the NRAB has issued a final order. *Whitehouse v. Illinois Central R. Co.*, 349 U.S. 366, 373-74 (1955); *Transportation Union v. U.P.R. Co.*, 385 U.S. 157, 164 (1966). The courts are not to interfere in NRAB proceedings. *Slocum v. Delaware, L. & W.R. Co.*, 339 U.S. 239 (1950); *Order of Conductors v. Pitney*, 326 U.S. 561 (1946).

2. The Adjustment Board Proceeding.

This case involves a proceeding pending at the NRAB. American Train Dispatchers Association (ATDA) is a national collective-bargaining representative for persons employed as

train dispatchers by most of the nation's major rail carriers, including train dispatchers employed by Norfolk Southern Railway Company (Southern).[1] ATDA and Southern are parties to a long-standing national agreement, entered into May 27, 1937, as revised May 30, 1979, known as the "37/79 Agreement." The agreement requires that positions be properly classified, *e.g.*, "Positions, the duties of which fall within the scope of the Train Dispatcher Group, as the duties of that group are described by the Interstate Commerce Commission in its Order. . .shall be properly classified." (App. A, 5a).[2]

ATDA complained to Southern that some positions classified by Southern as "Superintendent, Transportation-Locomotive" (STL) at Southern's Atlanta Control Center were incorrectly classified, and should properly be classified as "Assistant Chief," "Night Chief," or "Chief Train Dispatcher." When Southern refused to reclassify the STL positions, ATDA appealed to a standing joint labor-management committee (Joint Committee), which has been established by ATDA and the rail carriers under the 37/79 Agreement. However, Southern objected to ATDA's appeal, asserting the Joint Committee lacked jurisdiction under the 37/79 Agreement to decide ATDA's appeal. (App. A, 4a).

ATDA thereupon invoked the jurisdiction of the NRAB in its contract dispute with Southern as to the authority of the Joint Committee to hear ATDA's appeal under the 37/79 Agreement. Southern countered with its action in the district court to enjoin the NRAB proceedings, "on the grounds that

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[1]Southern Railway Company, appellee below, changed its name in 1991 to the present Norfolk Southern Railway Company.

[2]For a reported decision involving the 37/79 Agreement and a different rail carrier, *see: CSX Transportation v. Train Dispatchers*, 126 LRRM 3021 (M.D. Fla. 1987).

the Adjustment Board was without statutory authorization to decide the matter." (App. A, 5a). Meanwhile, the NRAB proceeding continued to completion of ATDA and Southern submissions, and awaited assignment to a neutral for decision. (App. C, 19a).

3. District Court Decision.

The district court, in its unreported decision and judgment, enjoined ATDA from proceeding further at the NRAB to determine the juridiction of the Joint Committee to hear ATDA's appeal, and ordered that ATDA take steps to withdraw its dispute with Southern from the NRAB. (App. D, 28a-29a).

ATDA in the district court challenged Southern's right to judicial relief prior to a NRAB decision, pointing out that the NRAB's decision will be subject to judicial review. (App. C, 25a-26a). The court said it could decide, prior to arbitration, whether a dispute is arbitrable, citing *AT&T Technologies v. Communications Workers*, 475 U.S. 643 (1986) and *Air Line Pilots Intern. v. Delta Air Lines*, 863 F.2d 87, 91 (D.C. Cir. 1988), *cert. den.* 110 S.Ct. 79 (1989). (App. C, 26a).

The district court ruled that the matter before the NRAB was a "representation" dispute, cognizable before the National Mediation Board (NMB), and that it would violate the Railway Labor Act for any question affecting the representation of Southern's STLs to be decided by any agency other than NMB. (App. C, 26a). The district court gave two principal reasons. First, the district court stated that if ATDA ultimately was successful in having the 13 STL positions reclassified as dispatcher positions, ATDA will have 13 more positions added to the reach of its representation. The reclassified STL positions, according to the district court, would be filled by Southern, so that Southern would be free to permit the current STLs to remain in their positions, albeit

as train dispatchers subject to ATDA dues and the ATDA-Southern schedule agreement. (App. C, 24a).

Second, the district court also found the dispute to be a "representation" matter on the asserted ground the 37/79 Agreement permits the Joint Committee to decide only complaints involving the working conditions of train dispatchers, so that the NRAB would be required to decide whether the STLs are train dispatchers, and thus within the scope of ATDA's representation. (App. A, 6a-7a; App. C, 24a).

ATDA steadfastly denied it is seeking to represent the STLs; rather, ATDA maintains it is asserting its appeal to the Joint Committee on behalf of the train dispatchers it already represents, and to see that the work is given to train dispatchers. (App. C, 23a-24a).

4. Court of Appeals Decision.

The court of appeals affirmed the district court, but upon somewhat different grounds. On the authority of the district court to enjoin the NRAB's proceeding, the court of appeals recognized that the statutory scheme of the Railway Labor Act and the administrative law doctrine of primary jurisdiction ordinarily preclude review of the NRAB proceedings at this stage. (App. A, 11a). However, the court of appeals asserted the instant case falls with the exception of *Leedom v. Kyne*, 358 U.S. 184 (1958), as acknowledged in *Champion International Corp. v. EPA*, 850 F.2d 182 (4th Cir. 1988). The court of appeals stated that the district court did possess jurisdiction for the purpose of determining whether the NRAB could be exceeding its statutory authority in considering ATDA's claim, and that the district court in so doing was acting within its subject matter jurisdiction. (App. A, 12a):

> Thus, we acknowledged the very narrow exception that "the district court had subject matter jurisdiction

> to entertain the suit under *Leedom v. Kyne*, 358 U.S. 184 (1958), to the extent that it properly inquired whether the EPA had exceeded its delegated authority." *Champion*, 850 F.2d at 185-86. Applying this exception here, we find that the district court did possess jurisdiction, but only for the narrow purpose of determining whether the Adjustment Board would be exceeding its statutory authority in considering the Union's claim. The district court decided only this issue, and so we conclude that it was acting within its subject matter jurisdiction.

The court of appeals expressly did not review the district court's reliance upon asserted power of a court to make a threshhold inquiry as to arbitrability of a matter pending at the NRAB. (App. A, 12a n. 14).[3]

The court of appeals found that Southern is seeking to avoid the dedication of time, effort, and money to a NRAB proceeding that is manifestly beyond the jurisdiction of the agency. (App. A, 13a).

On the merits, the court of appeals found, contrary to the district court, that there is a controversy as to who would fill the former STL positions in the event the positions are classified as train dispatcher positions. (App. A, 9a). However, the court of appeals stated that ATDA's explanation of how the former STL positions would be filled demonstrates the existence of a representation dispute. (App. A, 9a).

The court reasoned that since ATDA stated that the former STL positions would be filled by employees holding seniority

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[3]Although NRAB proceedings have been termed "compulsory arbitration," the so-called arbitration is a mandatory statutory adjustment process, without an agreement to arbitrate. See: *Trainmen v. Chicago R. & I.R. Co.*, 353 U.S. 30, 36-38 (1957).

as train dispatchers, with the STLs ousted from their positions, the ATDA "will acquire 13 new positions." (App. A, 10a).

The court of appeals interpreted the 37/79 Agreement in important respects. The court said the agreement requires as a prerequisite to Joint Committee jurisdiction that the dispute involve the "working conditions of train dispatchers." However, the court disagreed with ATDA's reading of the 37/79 Agreement that "working conditions of train dispatchers" necessary to invoke jurisdiction under the 37/79 Agreement carries no necessary implication regarding the eventual disposition of the NRAB proceeding, because proper "classification" of Southern positions is a "working condition" of all present train dispatchers. The court of appeals interpreted the "working conditions of train dispatchers" prerequisite for ATDA's complaint is not satisfied because ATDA's complaint involves work being performed by existing STLs. (App. A, 10a):

> The agreement requires, as a prerequisite to Committee jurisdiction, that the dispute brought before the Committee concern the "working conditions of train dispatchers." Determining whether this prerequisite has been met in this case would require the Adjustment Board to decide whether the dispute is one over the working conditions of dispatchers, that class of employees which the Union represents. The Union argues that the dispute is one that concerns solely the working conditions of *existing* train dispatchers and "has no necessary implication regarding the STL positions." This argument ignores the facts. It is the work currently being performed by the STLs that the Union wishes to have reclassified, not work being performed by existing dispatchers. Further, it is the wages, benefits, and responsibilities

> of STLs that the Union seeks to change by reclassification; the Union does not seek changes in the manner in which existing dispatchers are treated.

The court of appeals considered it to be most important that the current STLs right to a job is directly threatened by ATDA's request for reclassification. (App. 10a). The court of appeals concluded that the dispute is a "representation" dispute and must be submitted to the National Mediation Board (NMB). (App. A, 11a).

ATDA's petition for rehearing, and suggestion for rehearing en banc, was denied on December 2, 1991. (App. B, 14a-15a).

REASONS FOR GRANTING THE WRIT

This case presents important issues concerning the orderly processing of so-called "minor disputes" at the National Railroad Adjustment Board (NRAB). The court of appeals has usurped the jurisdiction of that federal agency, prior to agency decision, in a manner which conflicts with heretofore settled opinions of this Court, and with that of the 10th Circuit.

I. THE DECISIONS OF THE SUPREME COURT REQUIRE THAT SOUTHERN EXHAUST THE PROCEDURES OF THE ADJUSTMENT BOARD PRIOR TO CHALLENGING THE BOARD'S JURISDICTION.

It has long been settled that the primary jurisdiction of the National Railroad Adjustment Board cannot be frustrated by premature judicial action. In *Whitehouse v. Illinois Central R. Co.*, 349 U.S. 366 (1955), a dispute arose between one union and the carrier concerning the latter's employment of a

member of another union in a position which the first union claimed under its collective bargaining agreement — a "scope rule" dispute. Rather than await final NRAB decision, the railroad sought injunctive relief in a district court to restrain further NRAB proceedings, alleging irreparable injury in being required to devote time and money to what it deemed an invalid NRAB proceeding.

The Supreme Court ruled that the inevitable result of injunctive relief would be to disrupt the NRAB's proceeding. 349 U.S. at 373:

> Railroad's resort to the court has preceded any award, and one may be rendered which could occasion no possible injury to it. The inevitable result is to disrupt the proceedings of the Board. Its decision has already been delayed for more than two years.

Further, the Supreme Court ruled that the possibility of needless expense incident to the NRAB proceeding is an inadequate basis for judicial intervention. 349 U.S. at 373-74:

> Moreover, among the injuries asserted by Railroad, only the possibility that it is being put to needless expense incident to the pending Board proceeding will necessarily be involved if judicial relief is denied at this stage of the administrative process. Such expense is inadequate basis for intervention whether by mandamus or injunction. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Utah Fuel Co. v. Coal Comm'n*, 306 U.S. 56.

See also: Transportation Union v. U.P.R. Co., 385 U.S. 157, 164 (1966):

> ...the primary jurisdiction of the Adjustment Board could not be frustrated by premature judicial action.

The courts are not to interfere in NRAB proceedings. *Slocum v. Delaware, L. & W.R. Co.*, 339 U.S. 239 (1950); *Order of Railway Conductors v. Pitney*, 326 U.S. 561 (1946).

The action of the district court below, affirmed by the court of appeals, in enjoining the NRAB proceedings, even prior to issuance of any NRAB order, runs counter to the entire history of the Supreme Court's rulings involving the NRAB.

1. Jurisdictional Challenges.

The court of appeals relied upon *Leedom v. Kyne* 358 U.S. 184 (1958), as applied by the court of appeals in a situation where injunctive relief was denied, *Champion Intern. Corp. v. U.S. E.P.A.*, 850 F.2d 182 (4th Cir. 1988), as authorizing its exception to the rule that precludes review of NRAB proceedings prior to final agency decision. (App. A, 11a-12a). This exception is claimed to be that the NRAB would be exceeding its statutory authority if it considered ATDA's claim. (App. A, 12a).

The court of appeals erred in adopting such an expansive view of *Leedom v. Kyne, supra*. There would not be a denial of anyone's rights, or irreparable injury, prior to final NRAB action. The *status quo* is preserved. Moreover, there is no concession the NRAB lacks jurisdiction over ATDA's claim, unlike *Leedom*.[4] However, there must be real present and immediate injury in order to invoke the *Leedom* exception. In addition to injury, the agency order must be made in excess of its jurisdiction and contrary to *a specific prohibition in the Act. Railway Clerks v. Employees Assn.*, 380 U.S. 650, 659-60 (1965). Further, *Leedom* involved solely the construction of

[4]Southern did not invite the views of either the NRAB or the National Mediation Board in either the district court or court of appeals.

a statute, not a factual dispute over the terms of an agreement. *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964).

Clearly, there must be more than the mere claim of lack of jurisdiction to allow an action seeking to enjoin an agency proceeding prior to final decision. Yet the basis for the court of appeals' decision is predicated solely upon jurisdictional grounds, absent any specific statutory prohibition, injury, or concession by the NRAB. Indeed, there is a specific statutory provisions *permitting* judicial review on jurisdictional grounds after final agency decision. 45 U.S.C. 153 First (q).

Accordingly, the court of appeals was incorrect in relying upon *Leedom*, to upset orderly review of a NRAB award. There is nothing in *Champion* to suggest a revision of *Leedom*, and such revision by a court of appeals would be improper in any event.[5]

2. Irreparable Injury.

There is no showing of irreparable harm to Southern if it is required to await final NRAB action prior to challenging NRAB jurisdiction. The only injury found by the court of appeals to Southern would be the time and expense of litigation. (App. A, 13a):

> Here, Southern is acting on its own behalf to be released from an improper assertion of jurisdiction by an agency. Further, Southern is seeking to avoid the dedication of time, effort, and money to a proceeding that is manifestly byond the jurisdiction of the agency hearing it.

However, as already indicated, time and expense of litigation

[5]The holding in *Champion* is limited. *See: State of Okl. v. E.P.A.*, 908 F.2d 595, 602-3 n.6 (10th Cir. 1990).

are insufficient reasons to disrupt the NRAB process. *Whitehouse v. Illinois Central R. Co.*, 349 U.S. at 373-74. *See also: FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 242-43 (1980).

3. Interpretation of Agreements.

A critical contract interpretation made by the court of appeals was its interpretation of "working conditions of train dispatchers" contained in the 37/79 Agreement, *supra* 11-12. Paragraph 3 of the Agreement requires that positions be classified in accordance with the duties set forth in the Interstate Commerce Commissions's order. (App. A, 4a; App. C, 17a). Paragraph 4, followed by paragraph 5, authorizes complaints concerning "working conditions of train dispatchers." (App. A, 4a; App. C, 17a-18a). It follows that "proper classification" of positions on Southern is a "working condition" of existing train dispatchers. *See:* Declaration of Robert J. Irvin, para. 9(b). This interpretation was confirmed by Special Board of Adjustment No. 800 on June 4, 1973.[6]

The error of the court of appeals was to make any interpretation at all regarding the 37/79 Agreement, particularly since Southern and ATDA were in disagreement. It is settled by the decisions of the Supreme Court that courts, state and federal, are without authority to interpret agreements in the railroad industry between carriers and employees, for the jurisdiction of the NRAB to interpret these contracts is "exclusive" *Order of Conductors v. Pitney*, 326 U.S. 561, 565-66 (1946); *Slocum v. Delaware, L. & W.R. Co.*, 339 U.S. 239, 244-45 (1950).

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[6]Joint Committee Docket No. 76, John H. Dorsey, Chairman. The decision is of record. *See:* JA 84, 100-103.

The court of appeals compounded its error in considering this to be a "representation" dispute involving whether an employee desires to be represented by a labor organization (App. A, 11a). The court opined that those persons occupying present STL positions should have an opportunity to determine whether they want ATDA representation. (App. A, 10a). The court misapprehends the "representation" scheme under the Railway Labor Act, which differs significantly from that under the Labor Management Relations Act. Whereas the National Labor Relations Board determines the "appropriate bargaining unit," the rail industry is governed by the "craft or class." ATDA is the certified representative for the "craft or class" of train dispatcher.

Contrary to the court of appeals, a bona fide representation dispute exists only when there is a question of who shall be the representative of an entire "craft or class" of employees. Such a question is not present here. Individual employees, such as the incumbents of the present STL positions, cannot determine whether or not they wish to be represented by a union, as an additional part of an existing "craft or class." 45 U.S.C. 152 Fourth.

The fact that STL jobs may be directly threatened by ATDA's request for reclassification, does not create a "representation" dispute subject to NMB jurisdiction.

It is important that the Supreme Court correct the so-called "representation" concept advanced by the court of appeals, particularly so that the misinterpretation is not repeated.

II. THE OPINION OF THE FOURTH CIRCUIT IS CONTRARY TO THE DECISION OF THE TENTH CIRCUIT.

The opinion of the court of appeals below is contrary to the decision in *Brotherhood of Locomotive Eng. v. Denver & R.G.W. R. Co.*, 411 F.2d 1115 (10th Cir. 1969). In the Tenth Circuit case, it was a railway labor union that sought to enjoin hearings before a special adjustment board established under 45 U.S.C. 153, Second, of the Railway Labor Act.

The Tenth Circuit in affirming the district court's denial of injunctive relief, stated that the courts should not interfere in the adjustment board process unless the lack of jurisdiction is clear *and* the exercise of board jurisdiction would leave the party without remedy. The Tenth Circuit cited several of the leading Supreme Court cases in support of its ruling. 411 F.2d at 1117:

> The Railroad and the N.M.B. chose to take no part in the appeal, leaving the Firemen's Union as the only answering Appellee. No question of judicial review is raised on appeal. But we should not exercise our injunctive power to interfere with the establishment of the special board and the execise of its jurisdiction unless it is made to appear that the invocation of the board was clearly unauthorized and that the exercise of subject matter jurisdiction would leave the Appellant without remedy. *Transportation-Communication Emp. Union v. U.P.R. Co.*, 385 U.S. 157, 164 (1966); *Whitehouse v. Illinois Cent. R. Co.*, 349 U.S. 366 (1955), and cf. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51 (1938). Reviewing the trial court's declination to interfere with the administrative processes in this context, we affirm its judgment.

The courts of appeals for the fourth and tenth circuits are in conflict, which argues strongly for resolution by the Supreme Court.

III. THE OPINION OF THE FOURTH CIRCUIT INTERFERES WITH THE ORDERLY RESOLUTION OF CLASSIFICATION DISPUTES.

The opinion of the court of appeals is being utilized by the management of other carriers, in addition to Southern, to disrupt and to delay the proper classification of positions.

The 37/79 Agreement is national in scope, and not confined to Southern. Accordingly, carriers such as Chicago and Illinois Midland Railway Company, and Duluth, Messabi and Iron Range Railway Company, similarly are resisting proceedings for the proper classification of positions, giving as their reason the opinion below. ATDA anticipates that other carriers may follow this course. The result would be to impair the smooth working of labor relations for train dispatchers in the railroad industry, to the detriment of morale and the maintenance of an adequate and efficient transportation system. *Cf., United States v. Lowden,* 308 U.S. 225, 235-39 (1939).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the opinion and judgment of the United States Court of Appeals in this case.

Respectfully Submitted,

GORDON P. MacDOUGALL
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Attorney for Petitioner

March 2, 1992

APPENDIX A
PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

SOUTHERN RAILWAY COMPANY,
Plaintiff-Appellee,

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION,
Defendant-Appellant.

RAILWAY LABOR EXECUTIVES ASSOCIATION,
Amicus Curiae.

No. 90-2013

SOUTHERN RAILWAY COMPANY,
Plaintiff-Appellee,

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION,
Defendant-Appellant.

RAILWAY LABOR EXECUTIVES ASSOCIATION,
Amicus Curiae.

No. 90-2018

Appeals from the United States District Court
for the District of South Carolina, at Spartanburg.
G. Ross Anderson, Jr., District Judge.
(CA-89-2123-7-3)

Argued: October 30, 1990

Decided: November 1, 1991

Before RUSSELL and MURNAGHAN, Circuit Judges, and YOUNG, Senior United States District Judge for the District of Maryland, sitting by designation.

Affirmed by published opinion. Judge Russell wrote the opinion, in which Judge Murnaghan and Senior Judge Young joined.

COUNSEL

ARGUED: Gordon Pier MacDougall, Washington, D.C., for Appellant. Richard Edelman, HIGHSAW, MAHONEY & CLARKE, P.C., Washington, D.C., for Amicus Curiae. Jeffrey Stephen Berlin, RICHARDSON, BERLIN & MORVILLO, Washington, D.C., for Appellee. **ON BRIEF:** Jefferson V. Smith, Jr., CARTER, SMITH, MERRIAM, ROGERS & TRAXLER, Greenville, South Carolina, for Appellant. John O'B. Clarke, Jr., HIGHSAW, MAHONEY & CLARKE, P.C., Washington, D.C., for Amicus Curiae. Gregory W. Stevens, RICHARDSON, BERLIN & MORVILLO, Washington, D.C.; Frank H. Gibbes, III, RAINEY, BRITTON, GIBBES & CLARKSON, P.A., Greenville, South Carolina; William P. Stallsmith, Jr., Norfolk, Virginia, for Appellee.

OPINION

RUSSELL, Circuit Judge:

This suit was filed by appellee Southern Railway Company ("Southern") to enjoin the American Train Dispatchers' Association ("Union") from pursuing resolution of a dispute before the National Railroad Adjustment Board ("Adjustment Board"). Southern asserted that, under the Railway Labor Act ("RLA") the matter submitted to the Adjustment Board had been committed to the exclusive jurisdiction of another board, the National Mediation Board ("Mediation Board"). The district court held in favor of Southern, concluding that the Adjustment Board was without statutory authority to decide the

dispute submitted to it by the Union. The court issued a permanent injunction requiring the Union to withdraw the matter from the Adjustment Board. We affirm.

I.

This case arises at a time in the railroad industry when railroad labor unions are seeing, on a nation-wide basis, continually decreasing memberships. One of these unions, the American Train Dispatchers' Association, has decided to assert a claim that certain management positions at the Atlanta, Georgia, station of Southern Railway have been wrongly classified.[1] These positions, designated "Superintendents, Transportation-Locomotive" ("STL"), had been classified as management positions for nearly a quarter of a century by the time the Union brought its reclassification request. As managers, the STLs are not represented by any labor organization, and their work is not subject to a collective bargaining agreement. The Union, however, now seeks to have the classification of these positions changed to dispatcher. The result would be that the current STLs, to continue performing the same work, would be required to become dispatchers. The eligibility of these employees to continue working in the STL positions would be determined according to their seniority as established under a collective bargaining agreement known as the "Schedule Agreement."[2]

In attempting to have the positions reclassified, the Union has exercised rights and procedures set forth in another collective bargaining agreement, entitled the "National Agreement of May 27, 1937, as revised May 30, 1979." The agreement, to which both the Union and Southern are parties,[3] is generally known as the "37/79 Agreement."

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[1]Southern's records indicate that the only other request by the Union to reclassify the STLs as train dispatchers was asserted in 1985; however, the request was withdrawn, "without prejudice," shortly after it was made. The complaint at issue in the present case was filed with Southern on March 14, 1988.

[2]Article 4, ¶ e of the Schedule Agreement provides that, "In filling positions covered by this agreement, ability being sufficient, . . . seniority as train dispatcher shall govern."

[3]A number of carriers in addition to Southern are also signatories to this agreement.

Certain provisions of the 37/79 Agreement provide a framework whereby railroad employees can seek resolution of matters relating to their working conditions. Specifically, paragraph four of the Agreement provides that "[a]ny Train Dispatcher shall have the right to bring to the attention of the management, directly or through his designated and authorized representative, any conditions or practices . . . involving working conditions of train dispatchers." Under the Agreement, the dispatchers are to make their initial complaints directly to their employers. If a dispatcher is unsatisfied with the result of this direct complaint, the Agreement provides a procedure under which the dispatcher can appeal the complaint to a joint labor-management committee ("the Joint Committee"). The Joint Committee consists of three train dispatcher representatives and three railroad representatives, each with equal voting power.

Consistent with the procedures set forth in the 37/79 Agreement, the Union first submitted its request for reclassification directly to Southern. In its complaint, the Union quoted paragraph three of the Agreement, which provides: "Positions, the duties of which fall within the scope of the Train Dispatcher Group, as the duties of that group are described by the Interstate Commerce Commission in its Order . . . shall be properly classified." The Union's complaint stated, "Pursuant to the provisions of such paragraph (3), this is to request that the following positions be properly classified: 'Superintendent, Transportation-Locomotive, Atlanta Control Center.'"[4] Southern reviewed the complaint, but refused to reclassify the STL positions.

The Union then proceeded to the next step outlined in the 37/79 Agreement, submission of an appeal of Southern's decision to the Joint Committee. Southern objected to submission of the appeal to the Committee on grounds that the Committee lacked jurisdiction to decide the appeal. Under the 37/79 Agreement, the Committee has jurisdiction only to decide disputes brought by or on behalf of dispatchers. Southern argued that the dispute raised by the Union, however, was on behalf of the STLs, who are not dispatchers. Southern

[4]Specifically, the Union requested that the positions be "classified as Assistant Chief, Night Chief, or Chief Train Dispatcher." These titles are found in the Interstate Commerce Commission ("ICC") order referred to in paragraph three of the 37/79 Agreement.

sent a letter to the Chairman of the Joint Committee, stating that "Southern has never agreed, in the National Agreement or elsewhere, to empower the Joint Committee to resolve any questions pertaining to Southern's employment of STLs."[5]

Rather than await a determination by the Joint Committee on Southern's jurisdictional challenge, the Union withdrew its complaint, "without prejudice," and submitted the question of the Joint Committee's jurisdiction to the National Railroad Adjustment Board. The action with the Adjustment Board was initiated by the Union's filing of a "notice of intent to file an *ex parte* submission," pursuant to Section 3, First, of the Railway Labor Act, 45 U.S.C. § 153, First. Southern then filed this civil action in district court, seeking to enjoin the Union from going forward in the Adjustment Board proceeding on the grounds that the Adjustment Board was without statutory authorization to decide the matter.

Unlike other labor statutes, such as the National Labor Relations Act, the Railway Labor Act divides authority for resolving disputes between two different national Boards.[6] Those disputes classified as "representation disputes" are to be decided by the National Mediation Board, 45 U.S.C. § 152, Ninth, while those disputes classified as "minor disputes" are to be decided by the National Railroad Adjustment Board. *See* 45 U.S.C. § 153, First, (i). By specifically assigning certain types of disputes to different Boards, the Act grants authority which is separate and exclusive. Neither Board is granted authority in the Act to decide disputes that have been committed to the jurisdiction of the other Board. Southern asserted before the district court that the matter submitted by the Union to the Adjustment Board is a representation dispute, the type of dispute which only the National Media-

[5]Letter from R.S. Spenski, of Southern, to E.S. McKeown, Chairman of the Joint Committee (Oct. 12, 1988).

[6]The Act also allows invocation of Special Boards or Emergency Boards in limited circumstances, but those boards, unlike the national boards, are temporary. *See* Railway Labor Act, § 10, 45 U.S.C. § 160 (discussing emergency boards); *Consolidated Rail Corp. v. Railway Labor Executives' Association*, 491 U.S. 299, 303 (1989) (discussing special boards established by agreement of the employer and the unions).

tion Board has authority to decide. Thus, Southern argued, the Adjustment Board is without jurisdiction to hear the matter.

In characterizing the matter as a representation dispute, Southern asserted in its complaint that, to have standing to bring an action affecting the STLs, the Union must be found to be a representative of the STLs. Deciding this question, whether the Union is the representative of the STLs, would obviously involve the Adjustment Board in a representation dispute. The Union's response to this argument was that it was bringing the action on behalf of existing dispatchers. Thus, the Union argued, deciding whether the Joint Committee has jurisdiction merely required that provisions of the 37/79 Agreement be interpreted and enforced, making the dispute a "minor dispute," one properly before the Adjustment Board.

The parties filed cross-motions for summary judgment. After hearing oral argument on the motions, the district court found that the matter which the Union had submitted to the Adjustment Board was a representation dispute. The court so concluded for two reasons. First, and most obvious, if the Union is successful in having the thirteen STL positions reclassified as dispatcher positions, the Union will have added those thirteen positions to the reach of its representation. Based on evidence offered by Southern, the district court concluded that the newly reclassified STL positions would be filled by Southern, meaning that Southern would be free to allow the current STLs to remain in their original positions. These thirteen incumbents would become, upon reclassification, train dispatchers, subject to the requirement of paying Union dues and subject to the procedure for bidding for jobs under the seniority provisions of the Schedule Agreement.

Second, the 37/79 Agreement allows the Committee to decide only those complaints involving the "working conditions of train dispatchers." Thus, to resolve the question of the Joint Committee's jurisdiction, the Adjustment Board would be required to decide whether the complaint regarding the *STLs* stated a claim regarding the "working conditions of dispatchers." In deciding this question, the Adjustment Board would be determining whether the STLs are dispatchers and so within the scope of the Union's representation. Therefore, the court held, the dispute was outside the jurisdiction of the Adjustment Board

because the dispute was a representation dispute, one that the Railway Labor Act required to be resolved by the National Mediation Board. The court permanently enjoined the Union from pursuing the dispute before the Adjustment Board and required the Union to withdraw the matter.

The Union appeals, arguing that the matter submitted to the Adjustment Board was not a representation dispute, but a "minor dispute." The Union also challenges the district court's subject matter jurisdiction to intervene in the Adjustment Board proceeding, and asserts that Southern lacked standing to seek judicial relief.

II.

Disputes under the Railway Labor Act are of two kinds: those concerning the terms of collective bargaining agreements, and those concerning the proper representative for a group of employees. Disputes of the first type, those concerning the terms of collective bargaining agreements, are divided into the subcategories "major disputes" and "minor disputes." Disputes of the second type are called "representation disputes." The parties agree that a major dispute is not involved here, leaving only the question of whether the dispute submitted by the Union is a minor dispute or a representation dispute. Minor disputes arise "out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." 45 U.S.C. § 153, First, (i). Such disputes are of a type that they "may be conclusively resolved by interpreting [an] existing agreement." *Consolidated Rail Corp. v. Railway Labor Executives' Association*, 491 U.S. 299, 305 (1989). Representation disputes involve determinations as to whether a particular labor organization is, or should be, the representative of particular employees for purposes of collective bargaining. 45 U.S.C. § 152, Ninth. If, however, a dispute involves an overlap between a minor dispute and a representation dispute, the matter is to be resolved exclusively by the National Mediation Board. *Independent Union of Flight Attendants v. Pan American World Airways*, 664 F. Supp. 156, 158 (S.D.N.Y. 1987), *aff'd*, 836 F.2d 130, 131 (2d Cir. 1988) ("We affirm for substantially the reasons stated by the district court."); *see also Flight Engineers' International Association v. Pan American World Airways*, 896 F.2d 672, 673 (2d Cir.), *cert. denied*, 110 S. Ct. 2220 (1990).

Proper classification is important because the Act assigns disputes to the jurisdiction of different Boards depending on the nature of the dispute. If a dispute is a minor dispute, it is to be submitted to the Adjustment Board.[7] If a dispute is a representation dispute, it must be submitted to the National Mediation Board.[8] Because each of the two Boards is specifically assigned a certain type of dispute, the jurisdiction of each Board to hear the dispute assigned to it is separate and exclusive. The Adjustment Board is not empowered by the statute to hear representation disputes, and the Mediation Board lacks the statutory authority to hear minor disputes.[9]

Here, the Union has submitted to the Adjustment Board a dispute that is plainly a representation dispute. Before the Union filed its complaint in 1988, the STLs had worked as management employees for over twenty-three years and were never subject to a collective bargaining agreement. During that time, no one had questioned their status as management employees, and there had been no attempt by the Union to seek to represent them.[10] But now, in a time of dwindling Union memberships and loss of dispatcher positions, the Union has suddenly decided that the STL positions should be reclassified. The reclassification that the Union seeks would change the designation of these positions from management to dispatcher and, accordingly, would make available to the Union's existing members opportunities for new positions. It is clear from these facts that at the heart of the Union's reclassification request lies a representation dispute.

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[7]If the parties so choose, however, the dispute can be decided by a special adjustment board "established by the employer and the unions representing the employees." *Consolidated Rail*, 491 U.S. at 303-04.

[8]The National Mediation Board also has some authority over "major disputes." *See Burlington Northern Railroad v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 444 (1987).

[9]The only exception is that the Mediation Board is granted authority to determine one kind of minor dispute. If called upon by a party, the Mediation Board may interpret "any agreement reached through mediation." *Consolidated Rail*, 491 U.S. at 304 n.4.

[10]The only exception was a request by the Union to have the position reclassified in 1985; as noted *supra*, the request was withdrawn shortly after it was submitted.

The Union contends that the dispute is not a representation dispute and attacks the reasoning of the district court which led to a conclusion otherwise. The Union's argument is based on a dispute over who would fill the STL positions if the positions were reclassified. Specifically, the Union criticizes the district court's finding that, if the positions were reclassified, Southern would be free to fill the positions as it chose, even if that meant allowing the current employees working as STLs to retain their positions. The Union disagrees with this finding on the basis of the collective bargaining agreement known as the "Schedule Agreement." The Union asserts that, upon reclassification, the current employees would be "ousted" from their STL positions and replaced with existing dispatchers. Thus, the Union argues, it would not be adding a single new member. Instead, the Union would merely be shifting existing members to different jobs. The Union would still be representing exactly as many train dispatchers after reclassification as it did before reclassification.

Who would fill the STL positions in the event of reclassification is not clear. The district court accepted as "uncontroverted" Southern's statement that the current employees serving as STLs could continue to work as STLs. However, contrary to the district court's characterization of the matter as uncontroverted, the question of who would fill the positions upon reclassification *has* been disputed by the Union. The Union contends that the STL positions, once classified as "dispatcher" positions, would "be filled by employees holding seniority as train dispatcher."[11] The current STLs, who are not dispatchers, would then be ousted from their jobs to make the positions available to existing dispatchers. We conclude that the Union's explanation of how the STL positions would be filled demonstrates the existence of a representation dispute.[12]

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[11]Second Declaration of Robert J. Irvin ¶ 5.

[12]Under the explanation offered by Southern and accepted by the district court, seniority would not apply such that the current STLs would be ousted from their positions. Southern's argument was that, under its interpretation of the Schedule Agreement, the positions would be filled according to seniority at the location in question. However, Southern currently has no dispatchers with seniority that would apply to the Atlanta Control Center. With no eligible dispatchers for that location, Southern would be able to fill the jobs with whoever it chose, including the current STLs, even though they would be at the bottom of the seniority list as newly classified dispatchers. Certainly, under this scenario, the Union would acquire additional members within the scope of its representation, the incumbent STLs.

Assuming the Union is correct, and the current STLs are ousted, the Union will acquire thirteen new positions. The skills that the STLs will retain from their former jobs will now fall under the category of "dispatcher." Thus, if the STLs want to work in positions using the skills acquired as STLs, they must become dispatchers. Upon becoming dispatchers, they will fall within the scope of the Union's representation. However, as new members, it seems that they would come in at the bottom of the seniority list and, thus, lose their current jobs. Where there is such a direct threat to the jobs of the STLs, these employees should be allowed the opportunity to determine whether they want to be represented by the Union.

The Union also argues that, even though the issue the Union placed before the Joint Committee concerned reclassification, the issue before the Adjustment Board has nothing to do with reclassification. The sole issue before the Adjustment Board is whether the Joint Committee has jurisdiction. To answer this question the Board need merely construe the 37/79 Agreement, a task which does *not*, according to the Union, implicate a representation dispute. We disagree.

The agreement requires, as a prerequisite to Committee jurisdiction, that the dispute brought before the Committee concern the "working conditions of train dispatchers." Determining whether this prerequisite has been met in this case would require the Adjustment Board to decide whether the dispute is one over the working conditions of dispatchers, that class of employees which the Union represents. The Union argues that the dispute is one that concerns solely the working conditions of *existing* train dispatchers and "has no necessary implication regarding the STL positions." This argument ignores the facts. It is the work currently being performed by the STLs that the Union wishes to have reclassified, not work being performed by existing dispatchers. Further, it is the wages, benefits, and responsibilities of STLs that the Union seeks to change by reclassification; the Union does not seek changes in the manner in which existing dispatchers are treated. Most important, it is the current STLs continued right to a job that is directly threatened by the Union's request for reclassification.

Finally, the Union asserts that the dispute is actually a minor dispute, one within the statutory authority of the Adjustment Board,

because determining the Joint Committee's jurisdiction merely requires interpretation of the terms of the 37/79 Agreement. We find this argument to be completely without merit. While interpretation of the Agreement may be involved, the dispute clearly implicates representation concerns. It has been established that when a minor dispute and a representation dispute overlap, the matter should go before the Mediation Board. *Flight Engineers' International Association*, 896 F.2d at 673; *Independent Union of Flight Attendants*, 664 F. Supp. at 158.

Where the true nature of the dispute is so plain, we can see no reason to delay submission to the Board specifically empowered to hear the dispute. The dispute is a representation dispute and, as such, must be submitted to the National Mediation Board.

III.

The Union raises arguments challenging the district court's jurisdiction to decide this case and attacking Southern's standing to bring this action in district court. We find these arguments to be without merit.

First, the Union argues that "the district court has usurped the statutory scheme for testing the jurisdiction of the National Railroad Adjustment Board." The Railway Labor Act expressly allows review of assertions that the Adjustment Board lacked jurisdiction, but only after the Board has rendered a final decision. Thus, according to the Union, the RLA precludes an assertion of jurisdiction by a federal court prior to a final decision by the Adjustment Board. The Union also asserts that the administrative law doctrine of "primary jurisdiction" precludes judicial review at this stage of the Adjustment Board proceeding. While we agree that these arguments would generally preclude review of actions by the Adjustment Board, we find that this case falls within an exception.

In *Champion International Corp. v. EPA*, 850 F.2d 182 (4th Cir. 1988), we resolved the very issue that has been presented to us here. In that case, the EPA made arguments similar to those advanced by the Union in the present case. First, the EPA argued "that since it has only assumed issuing authority over Champion's permit and has not

made any final determination either to issue or to deny a permit, jurisdiction in this case has been specifically limited by statute." *Id.* at 187. Second, the EPA argued "that review is precluded by the related judicial doctrines of exhaustion of administrative remedies, ripeness, and finality." *Id.* We agreed with the EPA that, generally, the effect of applying either the statutory scheme for review or the administrative law doctrines would be to "place Champion out of court." *Id.* at 188. We recognized that there was, however, an alternative left to Champion, the argument "that the action of the EPA was so outside its statutory authority that the district court was justified in interrupting agency action." *Id.* Thus, we acknowledged the very narrow exception that "the district court had subject matter jurisdiction to entertain the suit under *Leedom v. Kyne*, 358 U.S. 184 (1958), to the extent that it properly inquired whether the EPA had exceeded its delegated authority." *Champion*, 850 F.2d at 185-86. Applying this exception here, we find that the district court did possess jurisdiction, but only for the narrow purpose of determining whether the Adjustment Board would be exceeding its statutory authority in considering the Union's claim.[13] The district court decided only this issue, and so we conclude that it was acting within its subject matter jurisdiction.[14]

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[13]We find our earlier decision in *South Carolina State Ports Authority v. NLRB*, 914 F.2d 49 (4th Cir. 1990), to be distinguishable. The statute involved in that case, the National Labor Relations Act, empowers only one national board to resolve disputes, the NLRB. There, it was clear that the NLRB had jurisdiction to hear the type of dispute submitted. The only question was whether one of the parties was properly before the Board. Here, the statute involved, the RLA, assigns different types of disputes to two different national boards with separate and exclusive jurisdiction. Unlike *South Carolina State Ports Authority*, it is clear in the instant case that the board attempting to assert jurisdiction is without authority to hear the *type* of dispute that has been submitted to it.

[14]The Union argues that the decisions in *AT&T Technologies v. Communication Workers*, 475 U.S.-643 (1986), and *Air Line Pilots International v. Delta Air Lines*, 863 F.2d 87, 91 (D.C. Cir. 1988), *cert. denied*, 110 S. Ct. 79 (1989), relied upon by the district court, "do not support the District Court's preemptive threshold inquiry into the NRAB's jurisdiction in a proceeding brought under 45 U.S.C. § 153, First." We do not address this contention, having found the district court's intervention in the Adjustment Board proceeding amply supported by the decision of this Court in *Champion*.

Second, the Union raises, by means of an *amicus* brief of the Railway Labor Executives' Association ("RLEA"), the argument that Southern lacks standing to present this case to the district court. Standing is allegedly absent because Southern is attempting to assert the rights of third parties, the STLs. According to the RLEA, Southern is faced with no injury in being required to appear before the Adjustment Board. The only persons with any potential injury are the STLs, who have not been joined in the proceeding but whose rights may nevertheless be decided in their absence. Thus, the RLEA asserts, Southern's challenge to the Adjustment Board's jurisdiction is really a challenge on behalf of a third party, the STLs. We disagree.

The narrow issue raised in the district court was whether the Adjustment Board was acting outside its authority in asserting jurisdiction over a matter to which Southern was made a party. It would be anomalous to follow a rule that would allow an agency's statutory authority to be challenged, but would deny a party to that dispute standing to raise the issue. Here, Southern is acting on its own behalf in seeking to be released from an improper assertion of jurisdiction by an agency. Further, Southern is seeking to avoid the dedication of time, effort, and money to a proceeding that is manifestly beyond the jurisdiction of the agency hearing it. We find that Southern has standing.

IV.

For the foregoing reasons, we conclude that the matter raised before the Adjustment Board was a representation dispute, that the court did have jurisdiction to determine whether the agency had clearly exceeded its powers, and that Southern had standing to bring the action in federal district court. Accordingly, the judgment of the district court is

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

FILED
December 2, 1991

No. 90-2013
CA-89-2123-7-3

SOUTHERN RAILWAY COMPANY
Plaintiff-Appellee

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION
Defendant-Appellant

RAILWAY LABOR EXECUTIVES ASSOCIATION
Amicus Curiae

No. 90-2018
CA-89-2123-7-3

SOUTHERN RAILWAY COMPANY
Plaintiff-Appellee

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION
Defendant-Appellant

RAILWAY LABOR EXECUTIVES ASSOCIATION
Amicus Curiae

On Petition for Rehearing with Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member

of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

JOHN M. GREACEN

Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

FILED
JAN 10 1990
ANN A. BIRCH
CLERK
US DISTRICT COURT
ENTERED
1-10-90

Civil Action No. 7:89-2123-3

SOUTHERN RAILWAY COMPANY,

Plaintiff,

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION

Defendant.

MEMORANDUM AND ORDER

This matter is before the Court on cross-motions for summary judgment. For the reasons set forth below, the Court will grant the motion of plaintiff Southern Railway Company ("Southern") for summary judgment and will deny the motion of defendant American Train Dispatchers Association ("ATDA").

Facts

Southern operates a railroad system in the southeastern and south central United States. Southern is a "carrier" for purposes of the Railway Labor Act, 45 U.S.C. § 151 *et seq.* Southern is a subsidiary of the Norfolk Southern Corporation, which also controls other railroads. ATDA is a labor organization that represents Southern employees who are in the "craft or class" of train dispatchers, for purposes of collective bargaining under the Railway labor Act, 45 U.S.C. § 151 Sixth, § 152 Fourth. Train dispatcher work on Southern is performed in accordance with the provisions of a collective bargaining

agreement, known as the "schedule agreement," to which Southern and ATDA are parties.

Southern and ATDA are engaged in a dispute involving thirteen Southern employees who work in Atlanta, Georgia, and are known as "Superintendents, Transportation-Locomotive" ("STLs"). The STLs are management employees who are not represented by a labor union; they do not work under a collective bargaining agreement. The STLs are responsible for "distribution of power," which consists of assigning locomotives to trains and particular facilities throughout the Norfolk Southern railroad system. Southern has used nonunion STLs to perform its power distribution work since 1965.

Southern and ATDA are parties to a national agreement, to which many of the nation's larger railroads are also parties. This national agreement was first entered into on May 27, 1937 and was revised on May 30, 1979; it is commonly called the "37/79 Agreement." The 37/79 Agreement provides in paragraph 3 that:

> Positions, the duties of which fall within the scope of the Train Dispatcher Group, as the duties of that group are described by the Interstate Commerce Commission in its Order, generally known as the "Occupational Classification," effective July 1, 1921, or as such Order has been or hereafter may be amended, shall be properly classified.

The agreement also provides, in paragraph 4, that:

> Any Train Dispatcher shall have the right to bring to the attention of the management, directly or through his designated and authorized representative, any conditions or practices involving safety in train dispatchers service, or involving working conditions of train dispatchers not covered by ex-

> isting agreements or agreements that may hereafter be negotiated between railroads and train dispatchers.[1]

The 37/79 Agreement establishes a procedure for the consideration of complaints brought under paragraph 4. If a train dispatcher's complaint is not satisfactorily resolved by the railroad, it may be appealed to a "Joint Committee" established under the agreement. The Joint Committee consists of three train dispatcher representatives and three railroad representatives. The Joint Committee, or a subcommittee established by it, investigates disputes, conducts hearings, makes findings, and attempts to resolve disputes submitted to it. In the event of a deadlock on the Joint Committee, the president of ATDA and the chairman of the National Railway Labor Conference, a trade association of railroads, attempt to dispose of the case or determine a proper way to break the deadlock.

On March 14, 1988, *twenty-three years* after Southern began using nonunion STLs to perform power distribution work, the ATDA general chairman for Southern's train dispatchers wrote to Southern, invoking paragraph 3 of the 37/79 Agreement and requesting that Southern's STLs be reclassified as train dispatchers, because in ATDA's view the STLs were performing duties of train dispatchers. After conferring with ATDA, Southern declined the request. By letter of September 20, 1988, ATDA then sought to bring its complaint before the Joint Committee. The chairman of the Joint Committee, who was an ATDA official,[2] accepted the complaint. Southern, however, objected to consideration of the complaint by the

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[1]Paragraph 4 also lists 13 subjects as to which complaints may be made. Among them are: adequate work force, number of rest days, privacy and elimination of noise, ventilation, and proximity of wash rooms.

[2]The chairmanship of the Joint Committee rotates between ATDA and railroad representatives. In 1988, ATDA held the position.

Joint Committee; Southern argued that the Joint Committee has jurisdiction to investigate only complaints that are brought by or on behalf of train dispatchers and, because the STLs are not train dispatchers, the Joint Committee lacks jurisdiction to consider a complaint presented on their behalf. ATDA withdrew its complaint from the Joint Committee by letter of December 28, 1988.

On July 7, 1989, ATDA filed with the Third Division of the National Railroad Adjustment Board ("NRAB") a "notice of intent to file an *ex parte* submission." The NRAB is a federal agency, located in Chicago and established under the Railway Labor Act, 45 U.S.C. § 153 First, that presides over the arbitration of disputes involving the interpretation or application of collective bargaining agreements in the railroad industry. ATDA's notice proposed that the NRAB decide the following question:

> Does the Joint Committee created under the provisions of the National Agreement dated May 30, 1979 (amending the May 27, 1937 National Agreement) between railroads represented by the NATIONAL CARRIERS' CONFERENCE COMMITTEE and employees of such railroads represented by the AMERICAN TRAIN DISPATCHERS ASSOCIATION, have jurisdiction to consider an appeal of the complaint concerning proper classification of positions presently designated Superintendent, Transportation-Locomotive, dated March 14, 1988?

ATDA's notice intitiated an arbitration proceeding at the NRAB. The NRAB case is headed toward an eventual hearing before a neutral referee. The NRAB has no procedure that allows for a threshold determination as to jurisdiction. Therefore, as a result of ATDA's filing its notice, Southern became obligated, as far as the NRAB was concerned, to participate in the arbitration proceeding.

Southern then filed this civil action on August 24, 1989, invoking jurisdiction under the Railway Labor Act; 28 U.S.C. § 1331 and § 1337; and the Declaratory Judgment Act, 28 U.S.C. § 2201. Southern alleged in its complaint that in submitting to the NRAB the question whether the Joint Committee has jurisdiction over a complaint supposedly asserted on behalf of Southern's STLs, ATDA was seeking to have the NRAB determine whether ATDA has standing to represent the STLs — *i.e.*, whether ATDA represents the STLs under the Railway Labor Act. This, contends Southern, amounted to asking the NRAB to decide a representation dispute.

Southern contends that, under the Railway Labor Act, 45 U.S.C. § 152 Ninth, representation disputes are exclusively within the jurisdiction of the National Mediation Board ("NMB"), a different federal agency. Section 152 Ninth provides:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the [National] Mediation Board, upon request of either party to the dispute to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier.

Southern argues that the NRAB therefore has no authority to decide the question submitted to it by ATDA. Southern asks for a judgment declaring that the NMB has exclusive jurisdiction to resolve the question whether Southern's STLs should be brought within the scope of ATDA's representation, and that the NRAB has no authority to decide that question.

Southern also seeks a permanent injunction enjoining ATDA from prosecuting before NRAB the dispute over whether the Joint Committee has jurisdiction to consider the appeal of ATDA's complaint concerning the classification of STL positions.

Although the facts are not in dispute, ATDA takes a very different view of them. ATDA admits that it does not now represent Southern's STLs and denies that it seeks to represent them. ATDA says it is not involved in a representation dispute with Southern concerning those employees; rather, ATDA says it only wants to take the STLs' work away from them and make it available to train dispatchers whom ATDA already represents.

ATDA also contends that in filing its original complaint with the Joint Committee, it was merely seeking to obtain enforcement of paragraph 3 of the 37/79 Agreement, which states that train dispatcher positions shall be properly classified; in submitting its question to the NRAB, ATDA says, it was making use of the arbitration remedy which, under 45 U.S.C. § 153 First (i), is available for questions of contract interpretation. ATDA argues that its dispute with Southern concerns the interpretation and application of the 37/79 Agreement and therefore it is not a representation dispute but a "minor dispute" which, under the Railway Labor Act, must be arbitrated.

Southern moved for a preliminary injunction to prevent ATDA from going forward with its NRAB proceeding. ATDA responded to that motion, and also answered the complaint and moved for summary judgment on Southern's claims. Southern also moved for summary judgment. The matter came on for hearing before the Court on December 20, 1989. The parties agreed that the case was ripe for summary judgment in that no material facts are in dispute and the only questions presented are questions of law. Southern agreed that, as both parties had moved for summary judgment, it was unnecessary

for the Court to consider the request for the grant of preliminary injunctive relief. In deciding the cross-motions for summary judgment, the Court has considered all evidentiary materials on file, including the declarations of Robert S. Spenski and Mark R. MacMahon (submitted by Southern) and Robert J. Irvin (submitted by ATDA).

Discussion

Because the material facts are not in dispute, it is appropriate for this case to be decided by summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

A.

It is well established that there are three kinds of disputes that may arise under the Railway Labor Act, and that the statute provides a distinct and separate mechanism for the handling of each type.

"Representation disputes" involve determinations as to whether a particular labor organization is, or should be, the representative of particular employees for purposes of collective bargaining. A representation dispute may exist even if only one union is involved. *International Brotherhood of Teamsters v. Texas International Airlines, Inc.*, 717 F.2d 157, 159 (5th Cir. 1983); *Independent Union of Flight Attendants v. Pan American World Airways, Inc.*, 664 F. Supp. 156, 158 (S.D.N.Y. 1987), *aff'd*, 836 F.2d 130 (2d Cir. 1988) ("*IUFA v. Pan AM*"). The NMB's jurisdiction over representation disputes is exclusive. 45 U.S.C. § 152 Ninth; *General Committee of Adjustment v. Missouri-Kansas-Texas R.R.*, 320 U.S. 323, 336 (1943); *Order of Railroad Telegraphers v. Leighty*, 298 F.2d 17, 19 (4th Cir.), *cert. denied*, 369 U.S. 885 (1962).

"Minor disputes' arise "out of grievances or out of the interpretation or application of agreements concerning rates of

pay, rules, or working conditions." 45 U.S.C. § 153 First (i). Arbitration of minor disputes is compulsory. *Consolidated Rail Corp. v. Railway Labor Executives' Association*, 109 S. Ct. 2477, 2480 (1989) ("*Conrail v. RLEA*"). However, when a single case involves an overlap between a representation dispute and a minor dispute, the matter must be resolved exclusively by the NMB, regardless of whether arbitrable issues are involved. *Air Line Pilots Association v. Texas International Airlines, Inc.*, 656 F.2d 16 (2d Cir. 1981); *Flight Engineers' International Association, PAA Chapter v. Pan American World Airways, Inc.*, 716 F. Supp. 110 (S.D.N.Y. 1989); *IUFA v. Pan AM*, 664 F. Supp. at 159.

Finally, "major disputes" concern the formation or alteration of labor agreements; they seek to create new contractual rights. *Conrail v. RLEA*, 109 S. Ct. at 2480. Major disputes are, ultimately, left to the parties themselves to resolve. The parties here agree that this case does not present a major dispute.

The Court concludes that the matter that the ATDA has put before the NRAB is, at its core, a representation dispute.

The question posed by ATDA for arbitration necessarily requires the NRAB to decide whether Southern's STLs are within the "craft or class" of train dispatchers, for which ATDA is the bargaining representative. To be cognizable under paragraph 4 of the 37/79 Agreement, a complaint must be made by a train dispatcher and must involve the working conditions of train dispatchers. In disputing the Joint Committee's jurisdiction to hear ATDA's complaint, Southern has denied that the complaint satisfies either requirement. ATDA is necessarily asking the NRAB to rule that the complaint satisfies both.

ATDA steadfastly denies that it is seeking to represent the STLs. Rather, ATDA contends that it is asserting its Joint

Committee complaint on behalf of the train dispatchers that it *already* represents, in that it is seeking to take the STLs' work away from them and see that the work is given to train dispatchers; indeed ATDA wants to see the STLs "ousted from their positions." Defendant's Memorandum in Support of Motion for Summary Judgment at 8. The uncontroverted evidence, however, shows that if ATDA were to prevail in its complaint before the Joint Committee and succeed in having the STL positions reclassified as train dispatcher jobs, the result would simply be the addition of thirteen positions (those occupied by the STLs) to the scope of ATDA's representation. The current train dispatchers would not necessarily benefit at all; Southern would not be obligated, under its schedule agreement with ATDA, to fire the STLs or turn their work over to the current train dispatchers. The occupants of the STL jobs would, however, undeniably become unionized train dispatchers. MacMahon Declaration at paras. 4-10.

For the same reason, a determination that ATDA's Joint Committee claim involves the working conditions of train dispatcher would necessarily imply a decision that the current STL jobs are, or should be, within the scope of the craft or class of train dispatcher, which ATDA represents.

The Court is not undertaking to render a definitive interpretation of the meaning of paragraph 3 or paragraph 4 of the 37/79 Agreement, or to define the extent of the Joint Committee's jurisdiction. The Court must, however, determine what the consequences would likely be of a ruling *by the NRAB* on the particular question of Joint Committee jurisdiction that ATDA has submitted for arbitration. The conclusion is inescapable that the NRAB's ruling would have the effect of deciding whether ATDA has representative status with respect to the occupants of what are now STL jobs. The NRAB has no proper role in making such a decision.

B.

ATDA argues that even if this case does involve a representation dispute, the Court should dismiss Southern's complaint because the "rule is 'hands off' if a representational dispute comes before the Court." Memorandum of Defendant in Opposition to Motion for a Preliminary Injunction at 6. It is certainly true that the Court would have no business *deciding* a representation dispute. *Order of Railroad Telegraphers v. Leighty; IUFA v. Pan Am.* The Court is persuaded, however, that it is appropriate for the judiciary to defend the Railway Labor Act scheme that assigns different types of disputes to different agencies. The courts have to make determinations about the extent of the NMB's exclusive jurisdiction in order to protect that jurisdiction. *See, e.g, Order of Railroad Telegraphers v. Leighty.* The injunction power is properly used to require the parties to disputes — whether carriers or labor organizations — to follow the procedures set forth in the statute. *Summit Airlines, Inc. v. Teamsters Local Union 295,* 628 F.2d 787 (2d Cir. 1980)[3]

ATDA also argues that Southern should be denied relief in this civil action, in any event, because the NRAB's decision will be subject to review in a future civil action that either party may bring in a United States District Court under 45 U.S.C. § 153 First (q).[4] That argument ignores the principale that the courts should defend the Railway Labor Act's scheme by preventing the resolution of a representation dispute by the

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[3]The federal courts are empowered to grant injunctive relief "to vindicate the processes of the Railway Labor Act." *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30, 41 (1957).

[4]The scope of review under this provisions is "among the narrowest known to the law." *Diamond v. Terminal Railway Alabama State Docks,* 421 F.2d 228, 233 (5th Cir. 1970).

wrong body. Even where a case involves elements of a minor dispute, the matter is still exclusively for the NMB to resolve where employees have a representational stake in the resolution of the dispute. *IUFA v. Pan Am*, 664 F. Supp. at 159. The NMB's exclusive jurisdiction would not be well protected if nothing could be done until after a representation matter had been decided by another agency. *See also AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 640 (1986) (courts decide, prior to arbitration, whether disputes are arbitrable); *Air Line Pilots Association v. Delta Air Lines, Inc.*, 863 F.2d 87, 91 (D.C. Cir. 1988), *cert. denied*, 110 S. Ct. 79 (1989).[5]

It is especially appropriate to protect the NMB's exclusive jurisdiction in this case, and to act before rather than after the NRAB has ruled, for the thirteen current STLs are not parties to the NRAB arbitration proceeding and have no voice before that agency. Only in a proceeding before the NMB would the STLs be able to express their own views as to whether or not they wish to be represented by the ATDA.

The Court has considered all the other arguments advanced by ATDA and has found them to be without merit.

C.

The Court finds that it would violate the Railway Labor Act for any question affecting the representation of Southern's STLs to be decided by any agency other than the NMB. The case that ATDA has presented to the NRAB inevitably calls for a determination that will affect the question of the STLs'

[5]ATDA cites cases holding that the jurisdiction of the NRAB should not be frustrated by premature judicial action. *E.g., Whitehouse v. Illinois Central R.R.*, 349 U.S. 366, 373-74 (1955). Those cases are inapposite, because if a matter is within the exclusive jurisdiction of the NMB, it is not properly befor ethe NRAB in the first place.

representation. Accordingly, it violates the Railway Labor Act for ATDA to pursue its arbitration case before the NRAB.

For these reasons, the Court concludes that Southern is entitled to a judgment as a matter of law. The Court will grant the declaratory relief requested by Southern. The Court finds that the NMB has exclusive jurisdiction to resolve the question whether Southern's STLs should be brought within the scope of ATDA's representation; the NRAB has no authority to decide that question.

Injunctive relief is also appropriate. ATDA shall be premanently enjoined from prosecuting before the NRAB the dispute over whether the Joint Committee has jurisdiction to consider the appeal of ATDA's complaint concerning the classification of STL positions. ATDA must withdraw its pending NRAB case. If ATDA has an interest in obtaining representative status with respect to Southern's STLs, ATDA will have to submit the matter to the NMB in accordance with the procedures of the Railway Labor Act.

Accordingly, IT IS ORDERED that:

1. The motion of plaintiff Southern Railway Company for summary judgment is GRANTED.

2. The motion of defendant American Train Dispatchers Association for summary judgment is DENIED.

3. Defendant American Train Dispatchers Association is directed to take all steps necessary, forthwith, to withdraw from the National Railroad Adjustment Board the pending case concerning the Joint Committee's jurisdiction.

G. Ross Anderson, Jr.
United States District Judge

Dated: January 9th, 1990

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA SPARTANBURG DIVISION

FILED
JAN 16 1990
ANN A. BIRCH, CLERK
U.S. DISTRICT COURT
ENTERED
1-16-90

Civil Action
No. 7:89-2123-3

SOUTHERN RAILWAY COMPANY,

Plaintiff,

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION,

Defendant.

JUDGMENT

This action came on for hearing before the Court, Honorable G. Ross Anderson, Jr., United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered, and plaintiff's motion for summary judgment having been granted,

IT IS ORDERED, ADJUDGED, and DECREED:

That the National Mediation Board has exclusive jurisdiction to resolve the question whether employees of plaintiff Southern Railway Company known as Superintendents, Transportation-Locomotive should be brought within the scope of representation of defendant American Train Dispatchers Association;

That the National Railroad Adjustment Board has no authority to decide the foregoing question;

That defendant American Train Dispatchers Association is permanently enjoined from prosecuting before the National Railroad Adjustment Board the dispute over whether the Joint Committee established under the National Agreement of May 30, 1979 (amending the agreement of May 27, 1937) has jurisdiction to consider the appeal of the American Train Dispatchers Association's complaint concerning the classification of Superintendents, Transportation-Locomotive positions; and

That defendant American Train Dispatchers Association shall take all steps necessary to withdraw the foregoing dispute from the National Railroad Adjustment Board.

Dated at Greenville, South Carolina, this 11th day of January, 1990.

ANN A. BIRCH, CLERK
By: Carolyn Moss
Deputy Clerk

FORM APPROVED:
G. Ross Anderson, Jr.

G. ROSS ANDERSON, JR.
UNITED STATES DISTRICT JUDGE